



**4312-52**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**36 CFR Part 2**

**[NPS-WASO-21549; GPO Deposit Account 4311H2]**

**RIN 1024-AE32**

**General Regulations; Areas of the National Park System, Sale and Distribution of Printed Matter and Other Message Bearing Items**

**AGENCY:** National Park Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The National Park Service (NPS) proposes to revise its general rule governing the sale and distribution of printed matter to include the free distribution of message-bearing items that do not meet the NPS regulatory definition of “printed matter.” This change would give visitors an alternative channel of communication while protecting the resources and values of the National Park System.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by the Regulation Identifier Number (RIN) 1024-AE32, by any of the following methods:

- Electronically: Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments after searching for “RIN 1024-AE32”.
- Hard copy: Mail or hand-deliver to: Lee Dickinson, Special Park Uses National Manager, 1849 C St., NW, MS 2355, Washington, DC 20240.

*Instructions:* It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. All comments received must include the agency name and RIN for this rulemaking. Comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Comments will not be accepted by fax, e-mail, or in any way other than those specified above, and bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be considered. Organizations should direct their members to submit comments individually using one of the methods described above.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment--including your personal identifying information--may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Please make your comments as specific as possible and explain the basis for them.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Lee Dickinson, Special Park Use Program Manager, at (202) 513-7092 or [lee\\_dickinson@nps.gov](mailto:lee_dickinson@nps.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

## *National Park System*

Currently consisting of over 400 units in 50 states, the District of Columbia and multiple territories, the National Park System covers more than 84 million acres. These units are located in a wide range of environments as diverse as the United States itself. The size of these units also varies tremendously, ranging from Wrangell-St. Elias National Park and National Preserve, Alaska, at 13.2 million acres, to Thaddeus Kosciuszko National Memorial, Pennsylvania, at 0.02 acres.

About one-third of the units—such as Great Smoky Mountains National Park, Tennessee; Grand Canyon National Park, Arizona; Everglades National Park, Florida; and Hawaii Volcanoes National Parks, Hawaii—preserve nature's many and varied gifts to the nation. The other two-thirds of the units recognize benchmarks of human history in America. These units protect elements of great native cultures, far older than European exploration and settlement; present battle sites from the Revolutionary and Civil Wars—including the key surrender fields of both great conflicts; embrace Thomas Edison's New Jersey laboratories where he and his staff led a technological revolution more dramatic even than the coming of the computer age; and more. These historical park units reflect the development of both art and industry in America, along with landmarks of social and political change.

As a broader understanding of history took hold, the National Park System eventually grew to include the historic homes of civil rights, political, and corporate leaders, and the lands of the poor, struggling to build lives for themselves on a Nebraska homestead claim or in an urban community. It now embraces the birthplace, church, and grave of Dr. Martin Luther King at Martin Luther King, Jr. National Historical Site, Georgia; the birth of jazz at New Orleans Jazz National Historical Park, Louisiana; the flowering of a literary giant at the Eugene O'Neill

National Historical Site, California; and the artistic grace of a great sculptor's studios at Saint-Gaudens National Historical Site, New Hampshire. Because of the lessons they help us remember, the National Park System also includes the Japanese American World War II internment camp in the desert at Manzanar National Historical Site, California, as well as Andersonville National Historical Site, Georgia, one of the very bleakest of the Civil War prison sites.

The National Park System is habitat for 247 threatened or endangered species, has more than 167 million items in museum collections, has 75,000 archaeological sites, and 27,000 historic and prehistoric structures. The National Park System also has an extensive physical infrastructure, which includes thousands of buildings, tens of thousands of miles of trails and roads, and almost 30,000 housing units, campgrounds, and picnic areas as well as 3,000 water and waste water treatment systems.

Over 307 million visitors visited the National Park System in 2015, where visitors find not only visual, educational, and recreational experiences but also inspirational, contemplative, and spiritual experiences. For Native Americans, certain national parks are also considered sacred religious sites, where the National Park Service (NPS) asks visitors to respect these long-held beliefs, such as by voluntarily not walking under a natural bridge.

### *Proposed Rule*

First Amendment activities in units of the national park system are governed by longstanding but ever-evolving First Amendment jurisprudence; by the statutes and regulations governing the national park system as a whole; and by park-specific statutes and regulations.

Title 36 CFR 2.52 currently allows the sale or distribution only of printed matter and only in areas of a park designated by the superintendent. The regulation defines “printed matter” as

“message-bearing textual printed material such as books, pamphlets, magazines, and leaflets, provided that it is not solely commercial advertising.”

The NPS recognizes, however, that items other than “printed matter” may also contain or present speech, either literal or symbolic, that is not solely commercial and whose expression may be protected by the First Amendment. Accordingly, the NPS now proposes to allow the free distribution of message-bearing items other than printed matter in areas of a park designated by the superintendent, subject to compliance with the regulations at 36 CFR 2.51, 2.52, and 5.3. These items include readable electronic media like CDs, DVDs, and flash drives; articles of clothing like hats and accessories like buttons and pins; key chains; and bumper stickers.<sup>1</sup>

Under the proposed rule, message-bearing items other than printed matter may not be sold within a park unit; they may only be distributed free of charge. This restriction is necessary to prevent the proliferation of unregulated commercial activity that would be inconsistent with park resources and values, that would impinge upon and degrade park scenery, and that would disrupt the atmosphere of peace and tranquility that is an important part of the visitor experience in many park units.

The proposed revision to § 2.52 to allow the free distribution of other message-bearing items, is consistent with the NPS’s National Capital Region (NCR) regulation, 36 CFR 7.96(k), that allows the free distribution of other message-bearing items. As discussed in the preambles to the proposed and final rules for the NCR regulation, 59 FR 25855 (1994) and 60 FR 17639 (1995), the NPS promulgated § 7.96 to resolve serious issues created by unregulated sales of

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<sup>1</sup> This proposed rule therefore enshrines in regulation NPS Policy Memorandum 14-01, (January 28, 2014), which requires superintendents to allow the free distribution of message-bearing items to the public other than printed matter, so long as the activity occurs within an area designated as available for First Amendment activities under 36 CFR 2.51(c)(1) and otherwise complies with 36 CFR 2.52.

merchandise on NPS-administered lands that resulted in conflicting and excessive commercialism; degraded aesthetic values; had negative impacts on visitor circulation and contemplation and historic scenes; and inhibited the conservation of park property. In upholding the constitutionality of the NCR regulation limiting the sales of such items, the U.S. Court of Appeals for the District of Columbia Circuit found that the regulation was “content neutral” and “narrowly tailored to serve significant government interests” and offered “ample alternative channels of communication” insofar as “members may display and give the audio tapes and [religious] beads to members of the public so long as they do not try to exact a payment or request a donation in exchange for them.” *ISKCON of Potomac v. Kennedy*, 61 F.3d 949, 952, 958 (D.C. Cir. 1995).

### **Compliance with Other Laws, Executive Orders, and Department Policy**

#### **Regulatory Planning and Review (Executive Orders 12866 and 13563).**

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We

have developed this rule in a manner consistent with these requirements.

**Regulatory Flexibility Act.**

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule expands opportunities for individuals and organizations to engage in small-group demonstrations and the sale or distribution of printed matter for which no permit need be issued. Other organizations with interest in the rule will not be effected economically.

**Small Business Regulatory Enforcement Fairness Act.**

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

**Unfunded Mandates Reform Act.**

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. It addresses public use of national park lands, and imposes no requirements on other agencies or governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

**Takings (Executive Order 12630).**

This rule does not effect a taking of private property or otherwise have takings implications under Executive Order 12630. A takings implication assessment is not required.

**Federalism (Executive Order 13132).**

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This proposed rule only affects use of federally-administered lands and waters. It has no outside effects on other areas. A Federalism summary impact statement is not required.

**Civil Justice Reform (Executive Order 12988).**

This rule complies with the requirements of Executive Order 12988. This rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

**Consultation with Indian tribes (Executive Order 13175 and Department Policy).**

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the criteria in Executive Order 13175 and under the Department's tribal consultation policy and have determined that tribal consultation is not required because the rule will have no substantial direct effect on federally recognized Indian tribes.

**Paperwork Reduction Act.**

This rule does not contain any new collections of information that require approval by the



Office of Management and Budget (OMB) under the Paperwork Reduction Act. OMB has approved the information collection requirements associated with NPS Special Park Use Permits and has assigned OMB Control Number 1024-0026 (expires 10/31/16). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

### **National Environmental Policy Act of 1969**

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by a categorical exclusion. We have determined that the rule is categorically excluded under 516 DM 12.5(A)(10) as it is a modification of existing NPS regulations that does not increase public use to the extent of compromising the nature and character of the area or causing physical damage to it. Further, the rule will not result in the introduction of incompatible uses which might compromise the nature and characteristics of the area or cause physical damage to it. Finally, the rule will not conflict with adjacent ownerships or lands uses, or cause a nuisance to adjacent owners or occupants.

We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

### **Effects on the Energy Supply (Executive Order 13211)**

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

### **Clarity of this rule.**

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to

write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### **List of Subjects in 36 CFR Part 2**

Environmental protection, National parks, Reporting and recordkeeping requirements

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 2 as set forth below:

### **PART 2—RESOURCE PROTECTION, PUBLIC USE AND RECREATION**

1. The authority citation for Part 2 continues to read as follows

**Authority:** 54 U.S.C. 100101, 100751, 320102.

2. Amend § 2.52 as follows:

- a. Revise the section heading.
- b. Revise the paragraph (a) subject heading.
- c. Add two sentences at the end of paragraph (a).

d. Revise paragraph (b) introductory text.

The revisions and additions to read as follows:

**§ 2.52 Sale of printed matter and the distribution of printed matter and other message-bearing items.**

(a) *Printed Matter and Other Message Bearing Items.* \* \* \* The term “other message-bearing items” means a message-bearing item that is not “printed matter,” that is distributed free of charge and without asking for payment or a donation, and is not solely commercial advertising. Other message-bearing items include, but are not limited to: readable electronic media such as CDs, DVDs, and flash drives; clothing and accessories such as hats and key chains; buttons; pins; and bumper stickers.

(b) *Permits and the small group permit exception.* The sale or distribution of printed matter, and the free distribution of other message-bearing items, is allowed within park areas if it occurs in an area designated as available under § 2.51(c)(2) and when the superintendent has issued a permit for the activity, except that:

\* \* \* \* \*

Dated: October 4, 2016

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Michael Bean  
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks  
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